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L.dz. ZF-III/16/2021

Warsaw, 1 October 2021

Amicus curiae brief

of the Federation of Associations of Uniformed Services of the Republic of Poland

in the case of

Janusz Leszek Bielinski v. Poland

and 22 other applications

Application No 48762/19

Introduction

This third-party intervention is filed by the Federation of Associations of Uniformed Services of the Republic of Poland pursuant to the consent granted by the President of the First Section of the European Court of Human Rights dated 17 September 2021.

We hope that the *amicus curiae* opinion will assist the Court in a comprehensive and multifaceted review of the case, taking into account the views and circumstances that may not always be presented by the litigants.

In attempting to answer the crucial problems formulated in the form of questions by the Court, i.e:

1. Did the applicants have access to a court for the determination of their civil rights and obligations, in accordance with Article 6 § 1 of the Convention, having regard to the fact that their civil cases before the ordinary courts have been suspended pending the Constitutional Court's ruling?

2. Was the length of the civil proceedings in the present cases in breach of the "reasonable time" requirement of Article 6 § 1 of the Convention? Reference is made to the fact that the dispute concerns the calculation of an old-age pension and affects a significant group of people.

3. Did the applicants have at their disposal an effective remedy to put before the domestic authorities the alleged violation of Article 6 § 1 of the Convention, as required by Article 13 of the Convention? In particular, were they able to challenge the alleged inactivity of the Constitutional Court?

We present our opinion below.

1. Legal interest of FSSM RP

The Federation of Associations of Uniformed Services of the Republic of Poland (FSSM RP) is a non-governmental organization established to represent the interests of its member associations, particularly in the field of pension rights, social and health care, and preservation of the social status to which former police officers, functionaries, and soldiers are entitled. Its purpose is to take all legally permissible measures to protect their inalienable rights and provide the necessary support and assistance they need.

2. Selected aspects of domestic law and its application in the light of the case law of the European Court of Human Rights

1. Approximately 26,000 pensioners of uniformed services whose old age pensions and health benefits had been reduced pursuant to the *Act on amending the Act on pension provision for officers of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Department and the Penitentiary Service, and their families" of 16 December 2016* filed appeals with the Regional Court in Warsaw against the decisions of the Director of the Pension Department of the Ministry of Internal Affairs and Administration (hereinafter referred to as ZER MSWiA) reducing their benefits. Under Polish law, namely Article 477^9 § 1 of the Code of Civil Procedure (hereinafter referred to as the Code of Civil Procedure), it is required that such appeals be filed with the court within 30 days of receiving the relevant decision through the director of ZER MSWiA. Pursuant to Article 477^9 § 2 of the Code of Civil Procedure, if the Director of ZER MSWiA does not recognize the appeal as valid, they are obliged **to forward it immediately**, together with the relevant case files, to a court of competent jurisdiction. This obligation is also stipulated in Article 83(6) and (7) of the Act on the social security system of 13 October 1998. The aforementioned Act limits the period for forwarding such appeals to **30 days** from the date of filing the appeal.

Meanwhile, the vast majority of the appellants' appeals were forwarded by the Director of ZER MSWiA subject to considerable delays, often after approximately 12 months from the date of their lodging or even later. There has therefore been an extended failure to act on the part of the competent authority, leading to a breach of the standard under Article 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") in terms of the right to have a case tried within a reasonable time. In setting forth the requirement that cases be tried within "*reasonable time*", the Convention emphasises the importance of the process of administering justice without delays endangering its effectiveness and credibility (*H. v. France*, § 58; *Katte Klitsche de la Grange v. Italy*, § 61). Article 6 §1 requires Contracting States to organise their legal systems so as to enable the courts to comply with its requirements.

In their great majority, the appellants had no information regarding the delay on the part of the Director of ZER MSWiA and, even if they had obtained such information, Polish law does not provide an effective remedy to force the Pension Authority to promptly forward the appeal to court. In our view, this infringes the provisions of Article 13 and contributes to a violation of Article 6 §1 of the

Convention since, in accordance with the Court's case-law (*Golder v. the United Kingdom*, § 32 in fine *Erkner and Hofauer v. Austria*, § 64; *Vilho Eskelinen and Others v. Finland* [GC], § 65), a reasonable period may begin to run even before the decision on commencing proceedings before a court is issued. In August 2018, the Polish Civil Rights Ombudsman signalled in his letter to the Minister of Interior and Administration the need for a systemic solution to this problem through a legislative initiative. No legislative action has been taken to date.

2. In January 2018, the District Court in Warsaw submitted a legal inquiry concerning the provisions of the Act under which old age and health benefits had been reduced to the Constitutional Tribunal (hereinafter referred to as CT). As a result, the courts suspended proceedings in most cases, pending the ruling of the CT. However, the CT has not issued a ruling in the case in question until this day (the proceedings have continued for over 3.5 years). Numerous motions to reassume the review of the cases were not granted by the courts. It was only in the spring of this year that they started resuming suspended cases and schedule hearings without waiting for the CT ruling. Polish law does not provide for a possibility for a party to challenge the protracted nature of proceedings by the CT. However, in accordance with the standard arising from the case-law of the European Court of Human Rights (hereinafter the Court) in terms of guaranteeing that a case will be heard within a reasonable time, Article 6 §1 of the Convention also covers proceedings before the Constitutional Tribunal (*Xero Flor v. Poland*). In our view, the lack of possibility to challenge the protracted nature of the proceedings by the Constitutional Tribunal violates Article 13 and has implications for the violation of Article 6 §1 of the Convention.

3. Pursuant to *the Act on complaints regarding a violation of the party's right to have a case examined in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings without undue delay" of 17 June 2004*, *t*he applicants filed complaints concerning protracted proceedings with the Court of Appeal in Warsaw as the court competent to examine them. Unfortunately, none of the complaints were upheld and the Court of Appeal justified its decisions by the necessity to suspend such cases pending the CT ruling. Under the aforementioned Act, a court hearing a complaint for protracted proceedings only examines court proceedings, without regard to what occurred before the appeal was filed. As a result, the complaints concerning protracted proceedings in these cases were illusory and ineffective within the meaning of Article 13 of the Convention.

   Published in July this year by the Helsinki Foundation for Human Rights, the Report on the effects of the Act reducing the benefits of officers of uniformed services shows that out of 664 complaints concerning protracted proceedings that had been filed with the Court of Appeal in Warsaw, only 9 were upheld. The practice of applying the aforementioned Act also raises doubts as to the amounts of damages awarded on account of protracted proceedings; the Act provides for sums ranging from PLN 2,000 to PLN 20,000. In cases where the court found the proceeding to be protracted, damages ranged from PLN 2,000 to PLN 5,000 (EUR 434 to EUR 1,086) for a trial that lasted close to 4 years, whereas average damages resulting from ECJ rulings against Poland approximate EUR 1,500 per every year of trial.

4. As of today, the duration of the proceedings involving the applicants exceeds 4 years and, in almost all cases except two where a binding verdict has already been passed, only the stage of verdict in the court of first instance has been reached. (Incidentally, all first instance verdicts have been in favour of the applicants).

   The reasonable length of the proceedings must be assessed in light of the following criteria arising from the case-law of the Court: the complexity of the

case, the conduct of the applicant, the actions of the authorities concerned, and the importance of the subject-matter of the dispute to the applicant (*Comingersoll S.A. v. Portugal* [GC]; *Frydlender v. France* [GC], § 43; *Sürmeli v. Germany* [GC], § 128).

a) The complexity of the cases in question is not significant. Documents necessary for resolving them could be gathered in the course of a few months at most. The court's inaction lasting in many cases several months was unjustified.

b) The applicants' conduct in no way contributed to the protracted nature of the proceedings. On the contrary, they took measures aimed at reaching a final judgment as soon as possible (complaints concerning case suspension, motions to resume suspended cases, complaints about protracted proceedings).

c) In many cases, the actions of the authorities were inappropriate and even illegal under Polish law. Case in point: significant delays in forwarding appeals to the court by the Director of ZER MSWiA, significant protraction of proceedings at the CT, and unjustified and prolonged suspension of proceedings. Indeed, courts reviewing the appeals could and should have applied decentralised judicial review of the constitutionality of the underlying law.

d) The importance of the subject-matter of the dispute is crucial in the cases in question. This is a matter of social security, i.e. matters of vital importance to the applicants that concern old age pensions or health benefits which, by their very nature, require particularly urgent treatment *(Borgese v. Italy* § *18).* Waiting for a final judgment for more than four years often translates to living that period in poverty or at least in significantly reduced circumstances, and undoubtedly violates Article 6 §1 in the context of Article 13 of the Convention. This is particularly important in light of the fact that a vast majority of verdicts passed in these cases have been in favour of the claimants: the courts are restoring their benefits to the amounts binding prior to the Act's entry into force, i.e. prior to 1 October 2017.

Finally, it is worth noting that on more than one occasion, in assessing whether the standard of trying a case within a reasonable time has been met, the Court has formulated the following view: "*The Court recalls that, as it has repeatedly held, Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (Scordino v. Italy (No. 1) [GC], § 183, and Sürmeli v. Germany [GC], § 129)",* and further stating that: *"Although this obligation applies also to a Constitutional Court, when so applied it cannot be construed in the same way as for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a Constitutional Court sometimes to take into account other considerations than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms (cf. Süßmann v. Germany [GC], §§ 56-58; Voggenreiter v. Germany, §§ 51-52; Oršuš and Others v. Croatia [GC], § 109). Furthermore while Article 6 requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice (Von Maltzan and Others v. Germany (dec.) [GC], § 132). Nevertheless, chronic overload in court cases cannot justify excessive length of proceedings (Probstmeier v. Germany, § 64).*" We are aware that the Regional Court in Warsaw in particular is extremely overloaded with cases brought by the recipients of old age pensions and health benefits of uniformed services whose benefits had been reduced. As of today, there are about 15,000 cases pending at the court in question. The

only organizational measures taken by the court to solve this problem involved establishing a special department dedicated exclusively to the cases of recipients of old age pensions and health benefits of uniformed services; the department employs 8 judges who, as from spring this year, have started to schedule hearings and issue verdicts.

3. Facts of the matter:

The first appeals against the decisions taken by the Director of ZER MSWiA, drastically and unlawfully reducing old age pension pensions for about 40,000 former police officers and State functionaries, were filed as early as mid-2017 and, in accordance with the legal procedure described in item 2.1, should have been immediately forwarded by the Director of ZER MSWiA to the Regional Court in Warsaw. However, the above legal prescriptions were completely ignored by the Director of ZER MSWiA and the appeals were forwarded to the court with a delay, in some cases even exceeding 12 months. Some longer delay periods have also been reported.

It should be additionally noted at this point that the Act of 16 December 2016 (hereinafter: Repressions Act) concerns thousands of citizens who have the right to expect their State, a member of the European Union, to determine without delay whether the abovementioned Act complies with the Constitution of the Republic of Poland. In addition, the Act results in a significant reduction in pensions and benefits that are the livelihood of the recipients of old age pensions and health benefits of uniformed services and their families, and is therefore existential in nature. It should also be pointed out that, under Article 2 sec. 3 of the Act, lodging an appeal against the decisions of ZER MSWiA drastically reducing the amount of retirement benefits did not suspend their enforcement, which is a unique legal phenomenon in social insurance cases.

The first decisions (verdicts) of the Regional Court in Warsaw (passed in 2017 and 2018), to which the Pension Authority had been gradually forwarding the appeals, involved mass-scale suspensions of court proceedings due to the judicial inquiry addressed to the Constitutional Tribunal by three judges of that court on 23 January 2018 concerning the compliance of the provisions of the Repressions Act of 16 December 2016 with the Constitution of the Republic of Poland. To date, despite several sittings and repeated adjournments of the hearings, the Polish Constitutional Tribunal has not issued any judgement in this matter, even though more than three years have lapsed since the receipt of the judicial inquiry.

It cannot be ignored that, in their judicial activity, judges are bound by law, which means that pursuant to Article 178 sec. 1 of the Constitution of the Republic of Poland they are subject to the Constitution and applicable laws. Meanwhile, in accordance with the position presented in the doctrine, including leading representatives of jurisprudence, as well as with case law of the Supreme Court, the court's obligation to abide by legal regulations is restricted by their compliance with the Constitution. A court may not apply laws that are contrary to the Constitution, for such action would constitute a violation of the principle of constitutional legality. In a situation where both the position and functioning of the Polish Constitutional Tribunal have been seriously undermined and, as many admit, no Constitutional Tribunal exists in Poland in the form provided for in the Polish Constitution, the burden of adjudicating on the constitutionality of statutory provisions must be shifted to common courts, administrative courts, and the Supreme Court. In view of the above, it seems obvious that courts are competent to hear appeals from decisions issued by the Pension Authority also on the basis of the Constitution of the Republic of Poland through its direct application, without the need to address judicial inquiries to a judicial body which lacks the qualities of the Tribunal as a "court of law". This possibility was advocated by the Polish

Supreme Court in its verdict of 17 March 2016. (case file no. III KRS 41/12), stating that "*since the Constitution is the supreme law of the Republic of Poland and its provisions apply directly, while judges are independent in exercising their office and subject only to the Constitution and laws (Article 178 sec. 1 of the Constitution of the Republic of Poland), there exists a possibility for the court to assess independently the compliance of statutory provisions with the Constitution for the purposes of the case under consideration, which becomes the obligation of the Supreme Court in the case where the Constitutional Tribunal has been presented with the relevant judicial inquiry that has not been resolved. In this case, therefore, it is not a question of the Supreme Court performing an assessment of the constitutionality of statutory provisions "in place of" the Constitutional Tribunal, but of "refusing to apply" provisions that are incompliant (especially manifestly) with the provisions (standards) of the Constitution of the Republic of Poland*."

In view of the dysfunction in which the Polish Constitutional Tribunal now finds itself, the aforementioned actions taken by judges should have been a norm; however, it has not been so. While some judges followed the aforementioned rules, others did not and refrained from reviewing appeals despite the passage of time.

It should also be noted at this point that the possible passing of a ruling by the Polish Constitutional Tribunal with the so-called "doubles" on the adjudicating panel (although it is not clear when that event took place) is a fundamental issue from the perspective of the rule of law, which is also relevant in this case. This may be relevant in the context of the Court's judgment of 7 May 2021 in the case *Xero Flor w Polsce sp. z o.o. v. Poland*, in which the Court held that the adjudicating panels of the Polish Constitutional Tribunal which included persons who had taken seats already duly filled, i.e. the so-called doubles, did not meet the criterion of a "tribunal established by law". The Court had no doubt that the appointment of three judges by the Sejm of the 8th term in December 2015 was unlawful. The Court held that passing a decision by an adjudicating panel of such composition violated the applicant's rights protected under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to fair trial). This was the first judgment evaluating changes to the Polish judiciary from the perspective of their compliance with the aforementioned Convention. The ECHR communicated to the Polish government that it would consider ten-odd other cases concerning the elements of the "judicial reform" devised by Poland's ruling coalition.

As of this day, some of the judges reviewing the appeals against the decision of the Pension Authority (drastically reducing pension and health benefits) have begun to pass verdicts, considering that waiting any further for the verdict of the Polish CT would be incompatible with the constitutional rights of the appellants to have their cases tried without undue delay (Article 45(1) of the Constitution of the Republic of Poland) as well as with their rights arising from Article 6 §1 of the Convention. Unfortunately, at the current rate of court proceedings and in light of a total of approx. 26,000 appeals filed, court proceedings (in the first and second instance) will take about 7 years.

4. Effects of protracted litigation.

The facts of the matter as described above illustrate a manifest limitation of the appellants' right to fair trial as referred to in Article 45 of the Constitution of the Republic of Poland and in Article 6 §1 of the Convention, which stipulates that: "Everyone is entitled to a fair and public hearing within a reasonable time by an

independent and impartial tribunal established by law." Although the general clause of *"reasonable time"* does not set any specific time limit, the duration of such time limit is determined by factors such as the complexity of the case and the conduct of the applicant but also, crucially, the importance of the case to the applicant. In the situation under review, that importance is absolutely existential.

The abovementioned Article 45 of the Constitution of the Republic of Poland is a standard which stipulates the right to trial that is equal to the principles of functioning of the judiciary, indicated and guaranteed by the Polish State in numerous legal acts. It follows from the foregoing that the efficiency of proceedings is expressed in terms of the duration of the entire course of the proceedings and includes the resolution of judiciary inquiries. Thus, if a proceeding before the Constitutional Tribunal initiated by a judicial inquiry posed by a court constitutes a stage of the judicial proceedings, and in view of the fact that that the body in question adjudicates on the rights of citizens in relation to public authority and that it has the status of a judicial body, it must be assumed that the charge of protracted proceedings also applies to the Polish Constitutional Tribunal. Proposing otherwise would lead to a conclusion that proceedings before the Polish Constitutional Tribunal are excluded from the binding force of Article 45 of the Constitution of the Republic of Poland and Article 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and *de facto* deprive Polish citizens of their fundamental rights, including the right to fair trial.

At this point, it is important to emphasize that the applicants have not contributed in any way to the extensive duration of the proceedings in their cases.

To date, the effects of the Repressions Act of 16 December 2016 and the protracted review of appeals against decisions made by the Director of ZER MSWiA have been tragic. We have recorded 61 confirmed cases of sudden deaths, including suicides, caused directly by the fact that old age and health benefits of former police officers and State functionaries had been drastically reduced. In many cases, they had lost their capacity to repay bank loans and other financial liabilities and had been pushed to the brink of poverty.

It has been estimated that almost 2,000 people out of the approximately 40,000 to whom the Repressions Act applies have not lived to see a fair judgment in their case. These people died of natural causes, but with a sense of the harm suffered from the State they served.

All this happened in a country that is a member of the European Union and was once the leader of democratic change in Eastern Europe.

CHAIRMAN
of the Federation of Associations of Uniformed Services of the Republic of Poland

Zdzisław CZARNECKI